IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. 3:16-cv-00024

THOMAS PAGANI, Plaintiff, v. MODUS EDISCOVERY, INC. f/k/a IVIZE SERVICES, INC., and ABTIN BUERGARI a/k/a ABTIN AKBARI a/k/a ABTIN ABKARI, Defendants.	**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff Thomas Pagani ("Plaintiff") respectfully responds herein to Defendants Modus eDiscovery, Inc. f/k/a Ivize Services, Inc. ("Modus") and Abtin Buergari a/k/a Abtin Akbari a/k/a Abtin Abkari's ("Buergari") (collectively "Defendants") Motion for Summary Judgment ("Defendants' Motion").

I. PRELIMINARY STATEMENT

Plaintiff, a former Modus employee, contends that Modus terminated him without Cause, thereby entitling him to severance pay under the parties' Employment Agreement. Conversely, Modus claims it terminated Plaintiff for Tier 2 Cause for failure to reach required sales targets. As described herein, Modus' own financial records do not support their claimed sales figures, thereby creating a disputed issue of material fact. As such, a jury must determine whether Modus was entitled to terminate Plaintiff with Cause, and whether Plaintiff is entitled to severance pay pursuant to the Employment Agreement.

II. FACTS

In March 2002, Plaintiff and two business partners formed Action Legal Copy of Charlotte, Inc. ("ALC"), to provide copying and related services to businesses, including law firms, in Charlotte, North Carolina. [Doc. 8, ¶7; Doc. 9, ¶7]. Plaintiff served as Vice President. [Id.]. Mt. Auburn Partners, LLC ("Mt. Auburn"), through Action Legal Document Services of Charlotte, LLC ("ALD"), purchased substantially all of ALC's assets on December 23, 2005. [Doc. 8, ¶8; Doc. 9, ¶8]. Pagani and ALD executed an Employment Agreement (the "Employment Agreement") on January 3, 2006, and ALD hired Pagani as its President. [Doc. 8, ¶9; Doc. 9, ¶9]; *see generally* [Doc.12-2, pp.4-19]. ALD subsequently changed its name to Ivize of Charlotte, LLC ("Ivize of Charlotte") on December 28, 2006. [Doc. 8, ¶10; Doc. 9, ¶10].

Approximately four (4) years later on November 17, 2010, Ivize Services was formed, which purchased substantially all Ivize of Charlotte's assets through an Asset Purchase Agreement. [Doc. 8, ¶11, 13; Doc. 9, ¶11, 13]. As part of the asset purchase, Ivize of Charlotte assigned Plaintiff's Employment Agreement to Ivize Services, which later changed its name to Modus. [Id.]. Buergari served as Modus' Chief Executive Officer. [Doc. 8, ¶12; Doc. 9, ¶12].

Pursuant to the Employment Agreement, Modus employed Plaintiff as a "Managing Partner" and later "Regional Discovery Executive." [Doc. 8, ¶17; Doc. 9, ¶17]. Plaintiff was paid an annual base salary and commissions.

Section 1 of the Employment Agreement provides that "[t]he Company shall employ [Plaintiff], and [Plaintiff] will provide services to the Company, for a term commencing as of the closing of the Acquisition . . . and continuing until terminated pursuant to Section 9." [Doc. 12-2, p.4 (¶1)]. Section 9, in turn, provides that Plaintiff's employment could be terminated by the Company with or without cause, and provides a mechanism for the payment of a severance

package under different scenarios. *See generally* [Doc. 12-2, p.9 (¶9)]. The severance provision of § 9 provides, in pertinent part, as follows:

> **(c) Severance.** If the Executive's employment is terminated by the Company without Cause (other than in the case of death or disability), or by the Executive with Good Reason, the Executive shall be entitled to receive severance for an 18 month period at a monthly rate equal to his average salary for the 6 calendar months preceding the month in which such termination occurs.
> . . .
>
> If the Executive's employment is terminated by the Executive without Good Reason, or by the Company for Tier 1 Cause or Tier 2 Cause, . . . the Executive shall not be entitled to any severance.

[Doc. 12-2, p.9 (¶9(c)].

The Employment Agreement defines "Tier 2 Cause" as

> (x)(a) the Net Sales from the Company's operations, during the most recent six calendar months ended at least 20 days prior to the date as of which Tier 2 Cause is to be determined, were less than $397,475.50 (35% below the trailing six months revenue as of the Acquisition Date) or (b) the Net Sales from the Company's operations, during the most recent twelve calendar months ended at least 20 days prior to the date as of which Tier 2 Cause is to be determined, were less than $753,315 (25% below the trailing twelve months revenue as of the Acquisition Date), and (y) the Company had losses (determined in accordance with generally accepted accounting principles) for such six calendar month period or twelve calendar month period, as applicable.

[Doc. 12-2, p.9 (¶9(d)(i)].

On December 12, 2012, Buergari, on behalf of Modus, informed Plaintiff that his employment was terminated. [Doc. 8, ¶23; Doc. 9, ¶23]. Plaintiff contends that he was not told he was being terminated for Tier 2 Cause, nor that he was being terminated for any other type of Cause. [Declaration of Thomas Pagani ("Pagani Dec."), ¶11]. By letter dated December 12, 2012 (the "Termination Letter"),[1] Buergari confirmed Plaintiff's termination and enclosed a proposed Severance Agreement and General Release (the "Severance Agreement"), which

[1] A true and accurate copy of the Termination Letter is attached to the Declaration of Thomas Pagani as Exhibit 1.

offered to pay Plaintiff 6-weeks' severance, or $9,230.76, in exchange for Plaintiffs' agreement to: (1) (falsely) acknowledge that he was not entitled to any severance payment under the Employment Agreement; (2) a new 12-month covenant not to compete; (3) a 12-month non-solicitation provide; (4) not to disparage Modus; and (5) release Modus from any and all claims, actions, demands and causes of action Plaintiff had against Modus based on his employment and/or termination of employment. [Pagani Dec., Ex. 1]. The Termination Letter also stated that Plaintiff would be paid all earned commissions. [Id.]. Plaintiff did not sign the proposed Severance Agreement. [Doc. 8, ¶36; Doc. 9, ¶36]. Modus did not pay Plaintiff any severance payments. [Doc. 8, ¶42; Doc. 9, ¶42].

On February 1, 2016, Plaintiff filed an Amended Complaint and asserted claims against Defendants for breach of contract and alternatively unjust enrichment. [Doc. 8]. On April 7, 2016, Defendants filed Defendants' Motion, [Doc. 11], a Memorandum in Support of Defendants' Motion, and supporting Declarations. [Doc. 12]. Therein, Defendants contend that Pagani was terminated for Tier 2 Cause, based on the assertion that the Net Sales (as that term is defined in the Employment Agreement) for the six-month period prior to Plaintiff's termination totaled $368,211.15, and that the Net Sales for the twelve-month period prior to Plaintiff's termination totaled $629,871.99. E.g., [Doc. 12-2, ¶¶6-7]. As such, Defendants contend that Plaintiff was not entitled to any severance, and that they did not breach the Employment Agreement. See generally, [Doc. 12].

On the other hand, Plaintiff contends he was not terminated for cause and is therefore entitled to severance pay, which he did not receive. Plaintiff also contends that Modus' profit and loss figures are not accurate or supported by the evidence because, *inter alia*, Modus' backup records are incomplete and multiple days of financial records are missing; multiple

invoices were improperly credited to a different Modus office instead of the Charlotte office; and Modus did not give the Charlotte office credit for several large projects. [Pagani Dec., ¶¶19-25]. Instead, Plaintiff contends that his termination was Without Cause, that he is entitled to severance pay, and that Modus' Tier 2 Cause argument is an after-the-fact attempt to avoid its contractual obligations. [Id. at ¶11]. Plaintiff further contends that he was actually terminated because he overheard Buergari boast about his sexual exploits with a woman who was not his wife. [Id. at ¶33].

At the time Defendants' filed Defendants' Motion, neither party had conducted any discovery. The Court permitted the parties to engage in targeted discovery, which they have done, and Defendants' Motion is ripe for disposition. On October 21, 2016, Plaintiff filed a Stipulation of Dismissal, by which Plaintiff dismissed his claims against Buergari. For all the reasons described herein, this Court should deny Defendants' Motion and allow a jury to determine whether Plaintiff is entitled to damages for Modus' breach of contract.

III. ARGUMENT

A. Legal Standard.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, this Court may grant summary judgment only where, construing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; see also Equal Employment Opportunity Comm'n v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

In this case, there are genuine issues of material fact regarding Plaintiff's claim for breach of contract, thereby necessitating denial of Defendants' Motion.

B. This Court Should Deny Defendants' Motion As To Plaintiff's Claim For Breach Of Contract.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." McKinnon v. CV Indus., Inc., 213 N.C.App. 328, 333, 713 S.E.2d 495, 500 (2011). Here, Modus admits that the Employment Agreement is valid and enforceable. [Doc. 12, p.8]. However, Plaintiff asserts, and Modus denies, that Modus breached the Employment Agreement by failing to pay Plaintiff severance. [Doc. 8, ¶55; Doc. 9, ¶55]. After Plaintiff's termination, he did not receive any severance payments from Modus. [Doc. 8, ¶42; Doc. 9, ¶42]. As described above, the Employment Agreement provides that if Plaintiff was terminated Without Cause, he is entitled to 18-months of severance. [Doc. 12-2, pp.9-10 (¶9(c))]. However if he was terminated for Tier 2 Cause, as Modus claims, he would not be entitled to any severance. [Id.]. As there are disputed issues of material fact as to whether Modus was obligated to pay severance, this Court should deny Defendants' Motion and let a jury determine whether Defendants are liable for breach of contract.

Modus claims that during the six-month period before Plaintiff's termination, the Charlotte office had Net Sales of $368,211.15, which is short of the $397,475.50 required by the Employment Agreement. Modus further claims that, during the twelve-month period before Plaintiff's termination, the Charlotte office had Net Sales of $629,871.99, which is short of the $753,315 as required by the Employment Agreement. Those positions are purportedly supported by Modus' Profit and Loss statements.

Plaintiff's Charlotte office was one of the busiest, if not the busiest, of all Modus' offices, including during the year prior to Plaintiff's termination. [Pagani Dec., ¶5]. Indeed, Plaintiff would regularly have to send some of his work to other less-busy Modus offices, including the Atlanta, Georgia office and the Charleston, West Virginia office, because the Charlotte office did

not have the capacity to complete all of its work. [Id. at ¶5]. When that happened, the supporting office would submit an invoice for the work it performed, but the originating office would get credit for the sale/revenue. [Id. at ¶7]; [Deposition of Thomas Pagani ("Pagani Depo."), pp.38, 39]. This was documented through the use of interoffice memorandums. [Id.]. Modus' Rule 30(b)(6) designee does not refute the existence of that policy. See [Deposition of Rick Schmidt ("Modus Depo."), p.20].

As described more fully in the Declaration of Thomas Pagani, Modus' own records do not support its current position or the alleged Net Sales figures reflected in its moving papers. First, Modus' records are incomplete and there are simply no records for certain days during the relevant time period, including but not limited to: December 5, 2011; December 19, 2011; December 27, 2011; March 5, 2012; March 8, 2015; March 23, 2012; March 26, 2012; and July 9, 2012. [Pagani Dec., ¶20]; [Pagani Depo., p.36]. Without backup data for all days, it is impossible to substantiate Modus' alleged numbers. Further, the missing records likely evidence additional sales and corresponding revenues for the Charlotte office. This creates a genuine issue of material fact, and Defendants' Motion must be denied.

Further, numerous records from Modus establish that Modus failed to properly attribute certain revenues to the Charlotte office. [Pagani Dec., ¶21 (describing multiple examples of invoices that should have gone towards the Charlotte office's Net Sales number but were instead improperly credited to a different office)]. These discrepancies also create a genuine issue of material fact as to whether Plaintiff was subject to a Tier 2 termination.

In addition, Modus did not give Plaintiff credit for all revenues associated several large contracts he secured during the relevant time period, including contracts with Michelin, Lorillard, and Kentucky Power. [Id. at ¶¶23-25]. The Michelin project was a large electronic

discovery job that included both an initial payment and recurring revenue, both of which should have been attributed to the Charlotte office. [Id. at ¶23]. The Lorillard project and Kentucky Power projects were both secured by Plaintiff, and both involved scanning a significant amount of documents. [Id. at ¶¶24-25]. In order to timely complete those jobs, Plaintiff had to send some of the boxes of documents to other Modus offices. [Id.]. However, Modus' records do not contain the interoffice memorandums evidencing that the Charlotte office received credit for the sales, as was Modus policy, thereby depressing the Charlotte office's numbers. [Id.]. These, too, create genuine issues of material fact as to whether Modus' purported numbers are accurate.

Along with the disputed issues, above, a jury should also determine whether the relevant Net Sales targets should also include sales from other Modus offices. In the Employment Agreement, sales goals must be met by the "Company," which is defined as Action Legal Document Services of Charlotte, LLC, and later as Ivize Services, Inc., both of which are Modus' successors-in-interest. [Doc. 12-2, pp.3-4]. Prior to the Employment Agreement's assignment to Modus, it was assigned to Ivize Services, which bought up several companies (including the Charlotte office), which then became Modus. [Modus Depo., pp.14-15]. However, Modus is a single entity, and not a conglomerate of separate regional companies, as was the case with its predecessors. [Modus Depo., p.15]. As such, "Company," as defined in the Employment Agreement, should include all Modus' offices, which would undisputedly be above the Employment Agreement's net sales targets.

As described above, Modus' own records show that Modus' alleged net sales figures are inaccurate and deflated. Each issue raised above is independently sufficient to create a factual dispute as to whether Plaintiff was, or could be, terminated for Tier 2 Cause, and whether

Plaintiff is entitled to severance under the Employment Agreement. This Court should therefore deny Defendants' Motion.

C. Plaintiff Has Abandoned His Alternative Claim For Unjust Enrichment.

In Plaintiff's Amended Complaint, he asserted a claim for unjust enrichment as an alternative to his claim for breach of contract. [Doc. 8, ¶¶58-64]. A claim for unjust enrichment is unavailable "if an express contract between the parties exists to resolve the damages dispute." Flexible Foam Prods. v. Vitafoam Inc., 980 F. Supp. 2d 690, 699 (W.D.N.C. 2013) (citing Vetco Concrete Co. v. Troy Lumber Co., 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962)). In this case, Defendants admit that the Employment Agreement is a valid contract. E.g., [Doc. 12, p.8]. As such, Plaintiff is no longer pursuing his alternative unjust enrichment claim.

IV. CONCLUSION

For all the reasons cited above and in the accompanying Declaration of Thomas Pagani, this Court should summarily deny Defendants' Motion for Summary Judgment and allow a jury to resolve the disputed material facts.

This the 21st day of October, 2016.

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies pursuant to LCvR 7.1(D) that this **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** is less than 25 pages, with 12 point font size, double spacing, one inch margins, and numbered pages.

This the 23rd day of May, 2016.

JAMES, McELROY & DIEHL, P.A.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** has this date been electronically filed with the Clerk of Court using the CM/ECF system, which will transmit notification of such filing, constituting service thereof, to Defendants' counsel of record as follows:

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This the 21st day of October, 2016.

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